

June 25, 2020

**BY EMAIL**

Ms. Christine E. Long  
Board Secretary  
Ontario Energy Board  
Suite 2700, 2300 Yonge Street  
P.O. Box 2319  
Toronto, ON M4P 1E4

Dear Ms. Long:

**Re: OEB Seeks Input on Virtual Hearings**

As requested by the Board in its letter of June 17, 2020 seeking input on the use of virtual hearings, Upper Canada Transmission, Inc. operating as NextBridge Infrastructure (“NextBridge”), a transmitter, hereby submits the following comments on issues set forth in the letter.

1. *What issues should the OEB consider as it plans for the ability to conduct a virtual hearing?*

**Written Hearings**

The comments set out below address the oral hearing process. The Board should also consider increased use of written hearings given some of the challenges in managing oral hearings.

**Moderator**

The OEB should consider that for each of its virtual conference and hearing processes there will need to be a clear and consistent moderator of the pre-hearing conference, technical conference, settlement conference as well as evidentiary hearings. The natural moderator during the evidentiary hearing is the chair of the OEB panel. For the pre-hearing conference, technical conference, and settlement conference it is recommended that a member of OEB Staff be designated as the moderator or the OEB appoint a neutral facilitator. In order to maintain independence, either an OEB appointed facilitator can lead the settlement conference or, if it is to be OEB Staff, the Staff member should not also be part of the hearing team in the proceeding. The role of the neutral facilitator or OEB Staff moderator, therefore, would be to ensure the orderly running of the conference, and determine process issues, such as order of speakers or questioners, whether the question was heard, and procedural issues related to questions on the handling of questions that go to confidential material.

## **Procedural Issues**

Protocols on the use of compendiums, application, and other evidence with a witness panel should be accounted for in the Zoom format and set forth in written instructions. Also, it will need to be clear that counsel defending witnesses have a chance to object in a manner that ensures the objection is heard and ruled on. It is not recommended that objections be conducted by a virtual “raising of hand” option, as that may delay a ruling. It is recommended that counsel be allowed to make an objection verbally, by stating “objection.” The chair or moderator should then immediately request that the questioning be stopped, and the panel witnesses not answer, and counsel who made the objection should provide the justification for the objection, the questioner allowed to respond, and then a ruling made. Also, when undertakings are requested, there should be a checking with Board Staff and counsel for the witness panel that they all understand the undertaking number and what is requested.

## **Witness Panels**

Witnesses will continue to operate in panels. It will therefore be necessary for them to consult off the record. Virtual break out rooms should be made available for this type of off the record consultation. In the alternative or if preferred by the witness panel, they should be allowed to use their own virtual platform to conduct the consultations. Having a witness panel be responsible for using their own virtual platform to conduct consultations would also alleviate the need for the OEB to develop such a room that is off the record and may therefore assist in reducing the complexity of OEB administering the conference or hearing.

## **Written Instructions**

All participants need to understand (1) how to use Zoom and (2) the manner in which the conference hearing will be led, including a clear agenda for settlement conferences and order of questioning and speakers, as applicable. The written instructions should include how counsel and the Board will show documents to witnesses, share settlement language in settlement conferences, for example.

## **Rehearsal and Sound Checks**

To the extent practical, it would be helpful if there is a rehearsal well prior to the start of a conference or hearing, as well as sound checks at the beginning of each new session (e.g., after lunch break) or day. The initial rehearsal could occur on a separate day or the day of, provided there is sufficient time. The primary purposes of the rehearsal and the sound checks are to ensure that all participants have been able to log-in and use Zoom, all can be heard and seen, and that unintentional echoing is identified and resolved. It is also an opportunity to go over the written instructions on how to use Zoom, including how to ensure you are on mute if you are not speaking, and how to come off mute.

*2. Are there any technical obstacles which would prevent you from participating in a virtual hearing?*

No, provided the Zoom platform is one other than the Zoom desktop version which is not allowed in some companies.

3. *Are there matters you think should be specifically discussed at a pre-hearing conference in advance of a virtual hearing?*

At the pre-hearing conference, it is recommended that the following matters be discussed.

### **Written Instructions**

In advance of the pre-hearing conference, written instructions should be provided on how conferences and hearings will be conducted via Zoom. Board Staff may wish to conduct a rehearsal prior for the pre-hearing conference so that all understand the instructions and are able to ask questions and test the options on Zoom.

### **Rehearsal**

Dates should be set for rehearsal prior to conferences and hearings or time set aside a 1/2-hour prior the day of the conference or hearing for sound check and rehearsal.

### **Pace of Conference and Hearing**

It is reasonable to expect that conferences and hearings will need to proceed at a slightly slower pace to ensure the questioner and witness panel is heard, and all involved can view the documents used during questioning. Therefore, it is recommended that at the pre-hearing conference, the need for additional day(s) for conferences and evidentiary hearings be discussed and decided.

### **Confidentiality**

If there is a need to conduct cross-examination on confidential material, there will be a need to ensure the Zoom platform only allows those who can participate in the cross-examination be allowed into the virtual hearing room. In this regard, there will need to be strict monitoring and protocols, including the use of encrypted passwords, to ensure that anyone in the virtual hearing room in which confidential information will be viewed and discussed is identified and authorized to be in the room. Those not willing to be identified or confirmed to be authorized should be disconnected by the host. If someone new joins the virtual hearing room, the chair or moderator/facilitator would stop the hearing and ensure that the new person is identified and authorized to be in the virtual hearing room prior to the discussion and viewing of confidential information being resumed. Parties who have confidential questions should be asked to identify the need to cross-examination on confidential information well prior to the hearing, so a separate session should be established for questioning on confidential information. For example, it would be helpful at the pre-hearing conference to set a date at which the parties are required to identify the time they expect to ask questions on public information and confidential information on a per panel basis.

### **Compendiums**

It will be helpful that compendiums be provided at least 3 full business days in advance of the hearing or technical conference, so that the Board, counsel, and witnesses have time to review them electronically and get used to using them in an electronic format. Also, some companies and firms will have limits on the amount of MBs that are allowed through their firewall, and at the prehearing conference there should be a consideration on a MB limit of the compendium if it is to

be emailed. The OEB should set up a virtual data room for compendiums, applications, exhibits, data responses, and other evidence. The same could be set up for confidential information, subject to a password provided only to those authorized to view the confidential information.

To avoid confusion and uncertainty, the protocol of conferences and hearings should be clear that witnesses are not required to comment on materials that are not included in a compendium.

### **Viewing of Evidence**

The written instructions and conference/hearing protocols will also need to be clear on how compendiums, applications, exhibits, information request responses will be shown so the witness, witnesses' counsel, questioner, and the Board can see the document at the same time the question is being asked. For example, if a witness panel wants to bring up a page of their application to help explain their answer, who will they direct that request to and how will it be displayed.

Please contact me with any questions.

Sincerely,

A handwritten signature in blue ink that reads "J. Tidmarsh". The signature is written in a cursive style with a large, looping initial "J".

Jennifer Tidmarsh  
Project Director, NextBridge